

No. 15628

United States
Court of Appeals
for the Ninth Circuit

SAM SNYDER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California.
Central Division.

FILED

SEP - 4 1957

PAUL P. GIBBONS, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

GEORGE T. ALTMAN,
233 South Beverly Drive,
Beverly Hills, California.

For Appellee:

LAUGHLIN E. WATERS,
U. S. Attorney;

EDWARD R. McHALE,
Asst. U. S. Attorney,
Chief, Tax Division;

ROBERT H. WYSHAK,
Asst. U. S. Attorney,
808 Federal Building,
Los Angeles 12, California.

United States District Court for the Southern
District of California, Central Division

No. 496-57 TC

SAM SNYDER,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

(Suit for Interest Included in Judgment)

Plaintiff brings this suit under the Judicial Code as amended, 28 U. S. C., Section 1346(a), for interest, pursuant to judgment, in the amount of \$3,249.19, plus interest thereon as allowed by law, and alleges as follows:

1. Plaintiff is an individual residing at Sherman Oaks, City of Los Angeles, California.

2. On March 29, 1955, there was entered in this court in favor of plaintiff and against Harry C. Westover, former Collector of Internal Revenue, in Docket 13521-Y, a judgment for refund of income taxes including, inter alia, individual income taxes (inclusive of interest paid thereon) in the sum of \$12,679.60 for the year 1943, \$6,372.67 for the year 1944, and \$2,838.03 for the year 1946, or a total of \$21,890.30, together with interest on said sums as

provided by law. A certificate of probable cause [2*] was included in said judgment.

3. On March 30, 1955, plaintiff filed with the Commissioner of Internal Revenue claims on form 843 for payment of said refunds, with "interest allowed by law," as ordered by said judgment.

4. Thereafter defendant issued a "notice of adjustment" in respect of the amounts so claimed, a photostatic copy of said notice being marked Exhibit "A" and attached hereto as a part of this complaint. Defendant, on or about December 16, 1955, refunded the sum of \$16,018.43, inclusive, of interest, as shown by said notice, but failed and refused, and still refuses, to pay the plaintiff any amount in excess of said sum.

5. In respect of taxes for the year 1943, the said judgment orders:

"Refund of individual income taxes (inclusive of interest paid thereon) in the sum of \$12,679.60, paid by plaintiff in respect to the year 1943, together with interest on said sum as provided by law as follows:

"On \$1,700 from May 6, 1948;

"On \$1,454.58 from August 9, 1948;

"On \$1,700.00 from September 9, 1948;

"On \$1,700.00 from October 8, 1948;

"On \$1,700.00 from November 6, 1948;

"On \$781.83 from December 6, 1948;

"On \$1,700.00 from January 13, 1949;

*Page numbering appearing at foot of page of original Certified Transcript of Record.

“On \$1,700.00 from February 14, 1949;

“On \$243.19 from March 14, 1949.”

As shown by page 2 of said notice of adjustment, however, defendant has refused to allow any interest on the first four of the above amounts or on \$864.56 out of the fifth of said amounts. In other words, defendant has refused to allow any interest on the first \$7,419.14 of the total of \$12,679.60 refundable for that year; yet [3] at the same time, as shown in the block at the bottom of page 1 of said notice, it has collected out of said judgment on the very same amount of \$7,419.14 interest in a total of \$4,161.21 from March 15, 1948, to December 6, 1955.

6. As also shown in the block at the bottom of page 1 of said notice, defendant has also collected out of said judgment the said sum of \$7,419.14 as the balance of an assessment for 1945.

7. Defendant has refused to pay interest on the portion of the overpayments so withheld to pay said assessment, but collected interest on the same amount as the assessment so paid.

8. Plaintiff on March 26, 1956, filed suit in this court against Robert A. Riddell, District Director of Internal Revenue, in Docket No. 20551-Y, for refund of \$10,715.10 out of said tax of \$7,419.14 and interest of \$4,161.21 for 1945 so collected out of said judgment. Said action is still pending, on notice of appeal.

9. Said taxes referred to in paragraph 2 above were collected by said Harry C. Westover, and said Harry C. Westover was not in office as collector of internal revenue when said action, Docket No. 13521-Y, was commenced, nor has said Harry C. Westover been in office since as collector or director of internal revenue. Nevertheless, a prior action in this court between the parties to this action, being Docket No. 20550-Y, in which plaintiff herein sued for the interest in the sum of \$3,249.19 claimed herein, and also for the said amount of \$10,715.10 as a balance due on said judgment, was dismissed on the motion of defendant herein for lack of jurisdiction on the ground that the action was not one for taxes alleged to have been overpaid, but rather a suit on a [4] judgment, and therefore within 28 U.S.C., Sec. 1346(a)(2), instead of Sec. 1346(a)(1) thereof.

Wherefore, plaintiff prays for judgment in his favor as follows: interest in the sum of \$3,249.19, plus interest on said sum as provided by Section 2411(b) of the Judicial Code, together with his costs and disbursements in this action, and such other relief as this court may deem meet and proper.

/s/ GEORGE T. ALTMAN,
Attorney for Plaintiff. [5]

U. S. TREASURY DEPARTMENT
OFFICE OF DISTRICT DIRECTOR OF INTERNAL REVENUE
Los Angeles, California

7800-B ☐
7800-C ☐
7800-E ☐
7800 ☐

NOTICE OF ADJUSTMENT

MR Sam Snyder
c/o George T. Altman
233 South Beverly Drive
Beverly Hills, California

ALLOWED, \$ 21,890.30
SCHEDULE No. IT-B-2727

This Notice of Adjustment is issued in settlement of a judgment for the recovery of income taxes paid for the years 1943, 1944 and 1946, the judgment having been rendered against Harry C. Westover, Former Collector of Internal Revenue, in the District Court of the United States for the Southern District of California, Central Division.

Judgment:	Tax	Interest	Total
1943	\$ 9,922.72	\$2,748.88	\$12,671.60
1944	5,025.19	1,347.48	6,372.67
1946	<u>2,539.33</u>	<u>306.70</u>	<u>2,846.03</u>
Total	\$17,487.24	\$4,403.06	\$21,890.30

Interest (See page 2) \$ 5,708.48

Total payable under the judgment \$ 27,598.78

DISPOSITION OF OVERASSESSMENT OR OVERPAYMENT

This amount has been applied as a reduction of unpaid assessments in excess of the correct liability, for the year stated above, therefore is not refundable amount.

ABATED \$ Overassessment

This amount is the refundable portion of the overassessment after giving effect to abatements and credits, if any. A check for this amount only is enclosed herewith.

REFUNDED \$ 10,309.95 Overpayment
\$ 5,708.48 Interest
\$ 16,018.43 Total refunded

This amount has been applied in payment of assessments which were unpaid, as shown below, therefore is not refunded.

CREDITED \$ 11,580.35 Overpayment
0 Interest
\$ 11,580.35 Total credited

WT AND ACCOUNT NO.	YEAR	AMOUNT CREDITED	DUE DATE**
15/42 221 \$14	1945	7,419.14	3-15-48
1042			
Acct. Int.		4,161.21	12-6-55

*The receipt by a taxpayer of refunds of taxes, the deduction of which in prior years resulted in tax benefits, should be treated as income for the taxable year in which such refund is received, except as otherwise provided by Federal statutes. The full amount of interest received and the interest, if any, allowed on the credit or refund of Federal taxes is taxable income and should be included in your income tax return or income for the taxable year in which received or applied as a credit to other taxes.

**If credited to original tax, show due date. If credited to additional tax, show assessment date.

hibit "A"

R. C. Kildall
District Director of Internal Revenue.

Sam Snyder

		Interest				
Interest at 6% on:		From	To	\$	None	
1943	\$1,700.00	5- 6-48	3-15-48	\$	None	
	1,454.58	3- 9-48	3-15-48		"	
	1,700.00	9- 9-48	3-15-48		"	
	1,700.00	10- 8-48	3-15-48		"	
	1,700.00 864.56	11- 6-48	12-6-55			355.06
	781.83	12- 6-48	12-6-55			328.37
	1,700.00	1-13-49	12-6-55			703.43
	1,700.00 843.94	2-14-49	12-6-55			344.84
	235.19	3-16-49	11-8-55			345.93
						93.79
						\$2,171.42
1944	619.79	5-17-49	11-8-55			240.86
	1,700.00	6-15-49	11-8-55			652.71
	1,700.00	7-15-49	11-8-55			644.21
	1,700.00	8-15-49	11-8-55			635.71
	652.88	9-15-49	11-8-55			240.87
						2,414.36
1946	727.43	3-14-49	11-8-55			290.32
	1,700.00	4-15-49	11-8-55			669.71
	418.60	5-17-49	11-8-55			162.67
						<u>1,122.70</u>
			Total	\$		5,708.48

Endorsed : Filed April 23, 1957.

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant and in answer to the allegations of plaintiff's complaint, admits, denies and alleges as follows:

I.

Admits the allegations of paragraphs 1 through 9 of the complaint.

Wherefore, defendant having fully answered plaintiff's complaint, prays that he take nothing in this suit; that plaintiff's complaint be dismissed; and that defendant be allowed its costs herein.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant United States At-
torney, Chief, Tax Division;

ROBERT H. WYSHAK,
Assistant United States At-
torney;

/s/ ROBERT H. WYSHAK,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 10, 1957. [8]

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION FOR
SUMMARY JUDGMENT

To Plaintiff, Sam Snyder, and to George T. Altman,
His Attorney:

You, and Each of You, Will Please Take Notice that on Monday, May 20, 1957, at 10:00 a.m., or as soon thereafter as counsel can be heard in Courtroom No. 7 before the Hon. Leon R. Yankwich, Chief Judge, in the Post Office and Courthouse Building, 312 North Spring Street, Los Angeles, California, defendant, United States of America, by and through its attorneys herein mentioned, will make the following motion for summary judgment:

The defendant, United States of America, moves the Court to enter summary judgment against the plaintiff and for the defendant, dismissing the complaint with prejudice on the ground that there is no genuine issue as to any material fact in this action, and that the defendant is entitled to judgment dismissing the complaint with prejudice as a matter of law as appears from the pleadings, exhibits, briefs and the affidavit of Edward P. Weathersbee, attached hereto and made a part hereof. [10]

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant United States At-
torney, Chief, Tax Division;

ROBERT H. WYSHAK,
Assistant United States At-
torney;

/s/ ROBERT H. WYSHAK,
Attorneys for Defendant.

Local Rule 3(d)(2) waived. May 9th, 1957.

/s/ LEON R. YANKWICH,
Judge.

[Title of District Court and Cause.]

AFFIDAVIT OF
EDWARD P. WEATHERSBEE

United States of America,
Southern District of California—ss.

Edward P. Weathersbee, being duly sworn, de-
poses and says:

That he is Chief of the Special Procedures Sec-
tion of the Office of the District Director of In-
ternal Revenue at Los Angeles, California;

That the records of the Internal Revenue Serv-
ice disclose that on March 15, 1948, an assessment
was made against Sam Snyder for the year 1945 in
the sum of \$11,803.51 income tax, plus \$1,363.22
interest, to February 18, 1948; and that on March
23, 1948, Sam Snyder was served with a notice and
demand to pay said assessment, but did not do so
within ten days thereafter;

That on December 6, 1955, \$11,580.35 was credited

against said assessment and the delinquent interest accrued thereon;

Further affiant sayeth not.

/s/ EDWARD P. WEATHERSBEE,
Affiant. [15]

Subscribed and Sworn to before me this 9th day of May, 1957.

[Seal] JOHN A. CHILDRESS,
Clerk, United States District Court, Southern District of California;

By /s/ M. E. THOMPSON,
Deputy.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 10, 1957. [16]

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO FINDINGS
OF FACT, CONCLUSIONS OF LAW, AND
SUMMARY JUDGMENT LODGED BY DE-
FENDANT

Plaintiff objects to the Findings of Fact, Conclusions of Law, and Summary Judgment lodged by defendant for the following reasons:

1. The answer admits all of the allegations in the complaint, and it contains no affirmative allegations. Except for the allegations in the complaint, therefore, and the affidavit attached to defendant's motion for summary judgment, there is nothing whatever upon which a finding of fact can be based. The Findings of Fact as prepared by de-

fendant, however, distort, by serious omission and by alteration of wording, the facts as shown by the complaint, the answer, and the said affidavit.

2. Local Rule 3(d)(2) requires that proposed findings of fact be served and filed with a motion for summary judgment. Defendant failed to file any such proposed findings. Plaintiff assumed therefore that defendant was proposing as findings the [18] facts as alleged and admitted in the pleadings, together with the affidavit which it submitted. But now defendant produces an entirely different set of findings. Except for the fact that Local Rule 3(d)(2) was waived by the Court there would be a clear violation of that rule. It is doubtful that the Court intended by such waiver to allow defendant to submit findings which varied substantially from the facts as shown by the record.

/s/ GEORGE T. ALTMAN,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 28, 1957. [19]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND SUMMARY JUDGMENT

The above-entitled matter having come on for hearing on the defendant's motion for summary judgment before the Honorable Leon R. Yankwich, Chief Judge, the plaintiff represented by his attorney, George Altman, and the defendant by its attorneys, Laughlin E. Waters, United States At-

torney; Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, by Robert H. Wyshak, Assistant United States Attorney, the plaintiff in open court having stricken the last sentence of paragraph 8 of the complaint by leave of court, and the Court having considered the affidavit, exhibits, arguments of counsel, and authorities submitted, makes its findings of fact and conclusions of law as follows:

Findings of Fact

I.

On or before March 15, 1946, plaintiff filed his individual federal income tax return for the year 1945 with the Collector of [21] Internal Revenue for the Sixth District of California and paid the taxes shown thereon to be due in the sum of \$4,300.69.

II.

On March 15, 1948, there was assessed against the plaintiff a deficiency in income tax for the year 1945 in the sum of \$11,803.51 plus interest in the sum of \$1,363.22 computed to February 18, 1948. On March 23, 1948, the plaintiff was served with a Form 17, Notice & Demand to pay said assessment, but did not do so within ten days.

III.

On March 29, 1955, there was entered in this Court in favor of the plaintiff and against Harry C. Westover, a former Collector of Internal Revenue, in Docket No. 13521-Y, a judgment decreeing an

overpayment of income taxes for the years 1943, 1944 and 1946 together with interest as provided by law. A Certificate of Probable Cause was included in said judgment.

IV.

With respect to the year 1943 the judgment set forth the following overpayments with the dates of payment as follows:

- \$1,700.00—May 6, 1948.
- \$1,454.58—August 9, 1948.
- \$1,700.00—September 9, 1948.
- \$1,700.00—October 8, 1948.
- \$1,700.00—November 6, 1948.
- \$ 781.83—December 6, 1948.
- \$1,700.00—January 13, 1949.
- \$1,700.00—February 14, 1949.
- \$ 243.19—March 14, 1949.

V.

On March 30, 1955, plaintiff filed with the Commissioner of Internal Revenue a judgment claim for refund based on said judgment. [22]

VI.

Thereupon, the Commissioner issued a Notice of Adjustment, Form 1331-B, advising the plaintiff that a portion of the adjudged overpayment of taxes had been credited to the unpaid balance of the outstanding assessment for the year 1945. The remaining overpayments together with interest to November 8, 1955, a date preceding the date of the refund check by not more than thirty days were refunded to the plaintiff.

VII.

On December 6, 1955, the District Director of Internal Revenue signed the schedule containing the overassessment whereby there was credited out of the overpayments for the year 1943, \$7,419.14 toward the balance of unpaid assessed tax for 1945, and \$4,161.21 toward interest accruing thereon from the date of the assessment, March 15, 1948, to December 6, 1955.

VIII.

Since the date of the assessment, March 15, 1948, of the 1945 tax liability preceded the dates of the payments made on the tax liability for the year 1943 as set forth in paragraph IV hereinabove, no interest was allowed on the overpayments credited to the assessed tax. Interest was allowed on the overpayments credited to the interest accrued on the unpaid assessment under §294(b) of the 1939 Int. Rev. Code, from the dates of payment to December 6, 1955.

IX.

Every conclusion of law deemed to be a finding of fact is hereby found as a fact and incorporated herein.

Conclusions of Law

I.

This Court has jurisdiction of the subject matter and the parties hereto. [23]

II.

Under §6402 of the 1954 Int. Rev. Code, the District Director properly credited the adjudged over-

payments for the year 1943 to the outstanding tax liability for 1945. *Cole vs. Helvering*, 73 F.2d 852 (D.C. Cir. 1934).

III.

Under §3771(b)(1) of the 1939 Int. Rev. Code, no interest was allowable on the overpayments for the year 1943 credited to the 1945 assessment made on March 15, 1948, since the dates of payment preceded the date of the assessment. Section 2411(a) of Title 28, U.S.C., provides for interest only in the event of a refund.

IV.

Delinquency interest properly accrued on the outstanding assessment for 1945, under §294(b) of the 1939 Int. Rev. Code, from the date of assessment to the date of the credit, December 6, 1955. Rev. Rul. 55-485, 55-2 Cum. Bull. 499, as modified by Rev. Rul. 56-573, 56-2 Cum. Bull.—

V.

The defendant is entitled to judgment dismissing the complaint with prejudice, together with its costs in the sum of \$20.00 taxed 6-6-57.

VI.

Every finding of fact deemed to be a conclusion of law is hereby concluded as a matter of law and incorporated herein.

Summary Judgment

In accordance with the foregoing findings of fact and conclusions of law,

It Is Hereby Ordered, Adjudged and Decreed that the complaint be dismissed with prejudice, that the plaintiff take nothing, and that the defendant have its costs in the sum of \$20, taxed 6-6-57, to be taxed by the Clerk of the Court.

Dated: May 28, 1957.

/s/ LEON R. YANKWICH,
United States District Judge.

Affidavit of service by mail attached.

Lodged May 23, 1957.

[Endorsed]: Filed May 28, 1957.

Docketed and entered May 28, 1957. [24]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that plaintiff Sam Snyder hereby appeals to the Court of Appeals for the Ninth Circuit from the order in the above-entitled case granting defendant's motion for summary judgment, which order was entered on May 28, 1957.

Dated this 11th day of June, 1957.

/s/ GEORGE T. ALTMAN,
Attorney for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed June 12, 1957. [26]

[Title of District Court and Cause.]

AMENDED STATEMENT OF POINTS ON
WHICH PLAINTIFF INTENDS TO RELY

1. This action being a suit for interest based upon a judgment covering the years 1943, 1944, and 1946, it is governed by Sec. 3773 of I.R.C. 1939, and Section 2411(a) of the Judicial Code (formerly sec. 177(b)).

2. Section 3771 of I.R.C. 1939 applies only to overpayments determined by the Commissioner, and not to overpayments ordered refunded by judgment.

3. It was not the intent of Congress to charge a taxpayer with interest on an assessment for a period of 7 years, but to deny him any interest for the same period on an overpayment offset against the assessment.

4. The assessment being paid out of the judgment, whether by credit of the judgment against the assessment or distraint for the assessment against the judgment, the result is constructively the same as the payment of the judgment by [28] check and attachment of the check in payment of the assessment.

5. The findings of fact do not conform to the pleadings and affidavits filed.

/s/ GEORGE T. ALTMAN,
Attorney for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed June 14, 1957. [29]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 33, inclusive, containing the original

Complaint;

Answer;

Motion and Notice of Motion for Summary Judgment and Supporting Brief and Affidavit;

Plaintiff's Objections to Findings of Fact, Conclusions of Law, and Summary Judgment Lodged by Defendant;

Findings of Fact, Conclusions of Law and Summary Judgment;

Notice of Appeal;

Amended Statement of Points on Which Plaintiff Intends to rely;

Amended Designation of Contents of Record on Appeal;

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Witness my hand and seal of the said District Court this 16th day of July, 1957.

JOHN A. CHILDRESS,
Clerk.

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15628. United States Court of Appeals for the Ninth Circuit. Sam Snyder, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed July 17, 1957.

Docketed: July 17, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.